Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1124

JOSEPH E. GEDRA, as an individual and as a Roman Catholic Priest, pastor of the Church of the Assumption, Vienna, Virginia,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

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Petition for a Writ of Certiorari to the Supreme Court of Virginia

OPINIONS BELOW

The refusal of the petitioner's petition for a writ of error and supersedeas was rejected by the Supreme Court at Virginia on November 16, 1976. A copy of this decision is on page A-1 of the Appendix. There was no written opinion of the Fairfax County Circuit Court where Father Gedra was convicted guilty on September 25, 1975, of conducting a church service, i.e. "Holy Mass" in a residence, in violation of Fairfax County Code, Section 30-2.2.1 which adopts therein 30-2.2.2.1.

JURISDICTION

The final decision of the Supreme Court of Virginia was entered November 16, 1976. The jurisdiction of

this Court rests on Title 28, United States Code, Section 1257 (3).

QUESTIONS PRESENTED

I. DOES A STATE COURT CONVICTION OF AN ORDAINED ROMAN CATHOLIC PRIEST FOR SAYING MASS IN HIS HOME, ATTENDED BY OTHER ROMAN CATHOLICS, VIOLATE THE FIRST AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AS APPLIED TO THE STATES THROUGH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, WHEN THERE IS NO NUISANCE, SAFETY HAZARD OR PARKING PROBLEM?

Petitioner says "yes."

II. IS IT A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO REQUIRE THAT A PETITIONER BE RESPONSIBLE FOR PERFECTING AN APPEAL WHEN THERE THE STATE REFUSED TO COOPERATE ON AGREEING TO A STATEMENT OF FACTS?

Petitioner says "yes."

STATUTES INVOLVED

Unless a special United States permit is granted, Amendment 195 to Section 30-2.2.251 the Fairfax County Code which is subsumed into Section 30-2.2.1 of the Fairfax County Code prohibits in residentially zoned area:

> Churches, chapels, temples, synagogues, convents, monasteries, seminaries, nunneries, and other places of worship, including Sunday shools and other uses appurtenant thereto:

Rule 5:15(i)(ii) of the Virginia Supreme Court Rules,

Code of Virginia 1975 Cumulative Supplemental states:

> A written statement of fact, testimony or other incidents of the case becomes a part of the record when...the statement is signed by the judge and filed in the office of the clerk. The judge may sign the statement forthwith if it is signed by counsel for all parties.

The statutes involved are in the nature of a permissive ordinance and Amendment 195 of the code excluded churches from the list of permissible uses. However, a church could be permitted by special use permit under Fairfax County Code, Section 30-7. Father Gedra and the Church of the Assumption applied for such a permit and were denied.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment Constitution of the United States:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment to the Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

On April 28, 1975, Mr. Lennart Koneczny, a zoning inspector for the County of Fairfax Zoning Administration, entered the home of Father Joseph E. Gedra, a duly ordained Roman Catholic priest, which home was owned by the Church of the Assumption, an unincorporated church, located in Vienna, Fairfax County, Virginia. There he observed the celebration of a Latin Mass according to the ancient ritual of the Roman Catholic Church. Father Gedra and his parishioners, as well as other Roman Catholics, prefer to attend the Latin Tridentine Mass rather than the New Order Mass officially prescribed by the Roman Catholic Churches that are accepted by the Bishop of the Arlington Diocese. Catholics who regularly attend Mass in Father Gedra's home travel from various parts of Virginia and Maryland and the District of Columbia. Other Catholics around the country have heard about the ancient Latin Rite Mass in Father Gedra's home and attend when they are in the area.

Father Gedra's home is located on a one-acre lot zoned one-family residential (Re-1). Neither he nor the Church of the Assumption obtained a special use permit to conduct Mass services at 10310 Vale Road. Father Gedra and his church applied for a

special permit and after hearings it was denied.

Counsel for Father Gedra and the church, John Joseph Matonis, advised Father Gedra, the church and its parishioners by a written opinion letter, dated on or about January 25, 1975, that if the parking and traffic problems were eliminated by having the parishioners park somewhere else and be shuttled to Father Gedra's home, the latter would then have a constitutional right to celebrate Mass in his home before the congregation. Said counsel told Father Gedra that, under the above conditions, the celebration of Mass in his home was protected by the constitutional guarantees of religious freedom. Relying on this advice of counsel, Father Gedra, the defendant-appellant herein, continued to celebrate the ancient Latin Rite Mass everyday and twice on Sunday, and three times on All Souls' Day (November 2) and Christmas.

The church took possession of the house and grounds at 10310 Vale Road in 1972 and immediately began celebrating Mass. From then until the present time the number of persons attending Mass on Sundays and Holy Days averaged between 20 and 25 persons per service. On Sunday morning, Father Gedra has conducted two services, one at nine and one at eleven. Father Gedra usually celebrates daily Mass alone, but on a very few occasions, a parishioner has attended Mass in Father Gedra's home.

The only bell-ringing that has taken place has

been the momentary ringing of small bells as part of the Mass ritual. The sound of bells and the occasional singing of hymns were not heard by any neighbors and cannot be heard outside the building. The building is a residential home in appearance as well as in fact and has no steeples, crosses or any other architectural structures that would make the building look like a church in any way.

Father Gedra celebrates Mass at an alter he fashioned in his living room. Seats are placed in the living room and in an adjoining dining room. Candles and other religious artifacts can be seen in the living room near the alter.

The driveway in front of the house is large enough for 13 or 14 cars, but is completely filled if that many cars are parked there. The driveway is accessible from both Hunter Mill Road and Vale Road. The other lots in the area are every bit as spacious as that at 10310 Vale Road. Adjoining 10310 on Hunter Mill Road and on Vale Road are similar lots with single family dwellings. Across Vale Road is an even larger lot with a single family dwelling. Across Hunter Mill Road is undeveloped land. Sunday Mass and Holy Day services do not pose a threat to the health and safety of the community, do not substantially increase traffic flow, do not cause street parking and do not interfere with the neighbors' use of their property or their peace and quiet.

Since 1972, those who know about the parking at

nearby Flint Hill Elementary School and the shuttle service to 10310 Vale Road park at the school parking lot about a mile away and are shuttled to and from Mass. However, some of the congregation attending Mass on any given Sunday do not know about the parking and shuttle policy and park in the driveway.

On the morning of the trial, November 10, 1975, the Washington Post paraphrased Robert F. Horan, Jr., Esq., the Commonwealth Attorney for Fairfax County, as saying that "the ordinance was never intended to apply to Bible study, prayer worship or prayer meeting in private homes." Defendant applied to the trial court to subpoena Mr. Horan and the court refused. The purpose of this subpoena, as stated by the defendant-appellant, was to show to the court the discrimination in the application of the zoning ordinance, particularly obvious in the allowance of Protestant prayer worship, prayer meetings and Bible study while the Catholic Mass is prohibited.

During his summation, the prosecutor said to the jury, in effect: "In essence, Father Gedra said to the community: 'Screw you.'"

The prosecutor argued to the jury that the conducting of a Mass in a private home, without a special use permit, was a matter that had to be stopped. He asked the jurors how they would feel if church services were conducted in their neighborhood.

Defendant-appellant requested instruction that the phrase "church services" or "church" should be

defined as a building that architecturally resembles a church and that if a religious service were conducted in a private home with no impact whatsoever on the architectural appearances, the health, safety, peace and quiet of the neighborhood, then the prohibition of "church services" could not be construed to apply to such a service. The court denied this requested instruction before the jury began deliberating and again when the jury asked a question on the definition of "church."

Petitioner was convicted and fined $50.00.

The Statement of Facts was agreed upon but after time had elapsed for filing the statement.

The above statement of facts is not in dispute. After the conviction of November 10, 1975, the Assistant Commonwealth Attorney who prosecuted Father Gedra, Lawrence Keenan, Esq., told counsel that he would agree if the summation statement quoting Father Gedra as saying "Screw you" was changed to read: "In essence, Father Gedra said to the community: 'Screw you.'" He then told counsel to make the change and send it to him and that he would file it. Since then, however, Mr. Keenan resigned his position at the Office of the Commonwealth Attorney and never filed the agreed-upon statement.

A series of assistant Commonwealth Attorneys was involved in this case. When counsel for Father Gedra attempted to perfect the appeal, Judge Thornton told counsel to work out a statement with the counsel for

Respondent. As the affidavit of trial co-counsel, Helen S. Lane (Appendix, p.A-7) sets forth, the Office of the Commonwealth Attorney refused to cooperate in preparing the record.

REASONS FOR GRANTING THE WRIT

I. THE CONSTITUTIONALLY-PROTECTED FREEDOM TO WORSHIP IS VIOLATED BY A STATE CONVICTION OF AN ORDAINED ROMAN CATHOLIC PRIEST FOR VIOLATING A COUNTY ZONING ORDINANCE BY SAYING MASS IN HIS HOME BEFORE OTHER ROMAN CATHOLICS WHEN THERE IS NO SAFETY HAZARD, NOISE, TRAFFIC OR PARKING PROBLEMS OF INTERFERENCE WITH THE PEACE AND QUIET OF THE COMMUNITY.

The conviction of petitioner, Father Gedra, in the Circuit Court of Fairfax County, Virginia violates the First Amendment of the Constitution as it applies to the states through the due process clause of the Fourteenth Amendment. The state may not establish a religion and there can be no justification of establishment by the claim of compelling state interest. Everson v. Board of Education, 330 U.S. 1, 15-16 (1946); Engel v. Vitale, 270 U.S. 421 (1962); School District of Abington Township v. Schempp, 374 U.S. 203 (1963). The anti-establishment clause of the First Amendment is violated when the effect of a state action either advances or retards religion. Schempp, supra; Braunfield v. Brown, 366 U.S. 599, 607 (1961); Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105 (1943).

The State of Virginia and Fairfax County, in effect, are establishing a religion by impeding the

saying of and attendance at the Latin Rite Mass, which is not approved by the Roman Catholic Church hierarchy and cannot be celebrated at the Roman Catholic Churches of the Diocese of Arlington. A zoning ordinance that prohibits even small, quiet church services in the home impedes religion generally. Further, such an ordinance has the effect of approving only the religious services held in public edifices in specially zoned areas.

Even though compelling state interest is no defense to such religious interference, petitioner submits that the argument that the practice of religion can be regulated by zoning ordinances should fail because there is no compelling state interest in this case. The free exercise of religion is abridged in violation of the constitutional guarantees of religious freedom when the state prohibits one's practice of religion. Sherbert v. Verner, 374 U.S. 398, 406 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972). In both these cases, the Supreme Court of the United States ruled unconstitutional state attempts to prohibit a religious practice because there was no compelling state interest in regulating the particular religious practice involved. In Brown v. Peyton, 437 F. 2d 1225 (4th Circuit, 1971), the U.S. Court of Appeals for the Fourth Circuit refused to allow the state to interfere with the practice of a religion by confined prisoners. Sherbert v. Verner held that before the state can

restrict the free exercise of religion, the activity the state seeks to regulate must pose "some substantial threat to public safety, peace or order."

In Brown v. Peyton, the Fourth Circuit upheld the right of a Virginia state prisoner to receive Black Muslim religious literature. The court held that for the state to restrict the Black Muslim from practicing his religion the state would have to demonstrate a "substantial threat to safety, peace, or order" and a "compelling state interest," and that "(T)he burden of proving the existence of such interest rests on the state." The court continued: "(P)laintiff's desire to practice his religion may be restricted only upon a convincing showing that paramount state interests so require."

In its prosecution of Father Gedra, the Commonwealth failed to demonstrate any state interests paramount to Father Gedra's right to practice his religion. Likewise, there is a lack of compelling state interest to warrant a zoning ordinance that prohibits a priest from saying Mass in his own home as part of worship by himself and co-religionists. There was no danger to the health and safety of the community, no traffic problem, no street parking, no audible bell-ringing or singing and no interference with the peace and quiet of the community or the privacy of neighbors. The lot is large. No neighbors are close enough to be bothered by the quiet worship taking place in Father Gedra's home on Sunday and on

a few religious Holy Days during the year.

There is no traffic, health or parking problem caused by Father Gedra and his small band of faithful who park over a mile away at an elementary school parking lot. The peace and quiet of the community is not disturbed. The only objection is to the idea of a religious service in the neighborhood. At the trial, the prosecutor in his summation asks the jury how they would feel if church services were conducted in their neighborhoods.

The right peaceably to assemble is another First Amendment right. With no effect on the surrounding community, Father Gedra and his co-religionists have a federally-protected right to assemble in Father Gedra's home to discuss religion and to pray.

In Stanley v. Georgia, 394 U.S. 557, 564 (1969), this Court held that a person may possess obscene matter in the privacy of his own home--even though this Court held there was a valid governmental interest in dealing with the problem of obscenity. Praying and celebrating the Mass should be granted the same constitutional protection.

The Court can take judicial notice of the facts that: 1.) People say grace at meals when guests are visiting, 2.) prayers are uttered at social affairs in homes, like scout meetings, 3.) bible study groups meet in homes, and 4.) homeowners have cocktail parties, invite guests, park on the street and often make noise when neighbors are sleeping. None of the above

activities are regulated by zoning ordinances--just this particular kind of religious service, in this case, the Catholic Mass.

"A zoning ordinance must have substantial relation to public health, safety, morals or general welfare." Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 395 (1926). This court reaffirmed that test in Nectow v. Cambridge, 277 U.S. 183, 188 (1928). This basic test was applied by this Court in Village of Belle Terre v. Boraas in holding a zoning ordinance constitutional. In Belle Terre supra, the Court explicitly limited its holding to a situation which "involves no 'fundamental' right guaranteed by the Constitution, such as voting...; the right of association...; or any rights of privacy..." 416 U.S. at 7.

The charge against Father Gedra, on the other hand, involves an infringement of fundamental First Amendment rights: The right to worship; the right not ot have a state-established religion; and the right peaceably to assemble.

II. PETITIONER SHOULD NOT BE PENALIZED FOR THE STATE'S FAILURE TO COOPERATE IN PERFECTING THE RECORD IN THE APPEAL TO THE VIRGINIA SUPREME COURT.

One convicted of a misdemeanor has a due process right under the Fourteenth Amendment to state cooperation in perfecting an appeal.

Petitioner is raising an important federal question. The defect in the record, caused by the state's

recalcitrance. The statement of facts was agreed upon finally. Petitioner points out that there never was any material disagreement but that the State's prosecutors just would not cooperate so that the statement could be timely filed.

Judge Thornton had insisted that counsel agree and that he not be involved in the matter, thereby leaving the matter in a state of limbo, a state which the State exploited.

CONCLUSION

This petition for a writ of certiorari should be granted.

Dated: February 14th, 1977.

John Joseph Matonis
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Telephone: 202/338-4200
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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday *the* 16th *day of* November, 1976.

The petition of Joseph E. Gedra, sometimes known as Reverend Joseph E. Gedra, for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Fairfax County on the 10th day of November, 1975, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the appeal was not perfected in the manner required by law, doth reject said petition and refuse said writ of error and supersedeas.

Record No. 760305 A Copy,

Teste:

Clerk

(COPY)

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	)	Appeal - Conducting church services from a single family dwelling, without a special use permit #21764
vs.	)	
JOSEPH E. GEDRA	)	

This 10th day of November, 1975, came the Commonwealth, by her Attorney, and the Defendant, JOSEPH E. GEDRA, appeared agreeably in accordance with his recognizance of bail; also appeared John Matonis, Counsel for the Defendant.

Thereupon, the Attorney for the Commonwealth made a motion to amed the warrant to read, "Section 30-2.2.1"; which motion the Court granted, without the objection of the Defendant or his Counsel

Thereupon, the Defendant was arraigned upon the warrants as amended, and in person, entered an oral plea of not guilty to the charge contained herein.

Thereupon, came a jury of eleven veniremen who were sworn and examined on their voir dire and found to be qualified and competent jurors, and the Attorney for the Commonwealth and Counsel for the Defendant having each alternately, beginning with the Attorney for the Commonwealth, stricken from the said panel the names of three of the said veniremen, the remaining five, to-wit: Edward Bisone, Mrs. Beverly Lozito,

Christopher Gill, Daniel Christman and James Knox constituted the jury for the trial of the Defendant and were sworn the truth of and upon the premises to speak and who heard the opening statement of Counsel for the Defendant and all of the evidence presented on behalf of the Commonwealth and the opening statement of Counsel for the Defendant and all of the evidence presented on behalf of the Defendant. Then Counsel for the Defendant, out of the presence of the jury, but in the presence of the Defendant, made a motion to strike the evidence presented on behalf of the Commonwealth and the opening statement of Counsel for the Defendant and all of the evidence presented on behalf of the Defendant. Then Counsel for the Defendant, out of the presence of the jury, but in the presence of the Defendant, made a motion to strike the evidence presented on behalf of the Commonwealth, which motion the Court, upon hearing argument thereon, denied. The jury was recalled and proceeded to hear evidence on behalf of the Defendant. Then Counsel for the Defendant, out of the presence of the jury, but in the presence of the Defendant, made a motion to strike the evidence presented on behalf of the Commonwealth, which motion the Court, upon hearing argument thereon, denied.

Thereupon, the jury was recalled, received instructions of the Court, heard the closing argument of the Attorney for the Commonwealth and of Counsel for the Defendant, and rebuttal argument of the

Attorney for the Commonwealth. Then Counsel for the Defendant, out of the presence of the jury, but in the presence of the Defendant, moved the Court for a mistrial, which motion the Court, upon hearing argument thereon, denied. The jury was recalled and were sent to their room to consult upon their verdict, and after some time returned into Court and rendered the following verdict, to-wit:

> "We, the jury, on the issue joined in the case of Commonwealth of Virginia vs. Rev. Joseph E. Gedra, Defendant, find the Defendant guilty of conducting church services from a single family dwelling without a special use permit, as charged in the warrant, and fix his punishment at $50.00.
>
> Daniel M. Christian
> Foreman."

Thereupon, the jury was discharged.

It is therefore ADJUDGED and ORDERED that JOSEPH E. GEDRA do pay a fine of $50.00 and the costs of this case.

The Court proceeded to advise the Defendant of his right to appeal from the sentence heretofore imposed, including the right to have the attorney's fees, costs and expenses in connection with an appeal paid for him in the event he is financially unable to pay the same.

And the Defendant having noted his intention to apply to the Supreme Court of Virginia for a writ of error, it is ADJUDGED and ORDERED that the execution of a sentence be, and the same is hereby postponed for a period of thirty days from this date to permit the Defendant to be present and assist his Counsel in seeking such writ of error. It is further ORDERED that the expiration of such thirty day period the Defendant

shall pay the said fine and costs in this case.

The Defendant is continued on bond.

_____

JUDGE

COMMONWEALTH OF VIRGINIA, COUNTY OF FAIRFAX:

To Any Law Enforcement Officer of the Commonwealth

Whereas, Leonard C. Kenecomy of

COMPLAINANT

Zoning Enforcement
Fairfax County Courthouse
Fairfax, Virginia

has this day made proper complaint before me under oath, and

Whereas, on the grounds of said complaint I have found probable cause to believe that Rev. Joseph E. Gedra

DEFENDANT

a W M born BIRTHDATE who can be located at 10310 Vale Road, Vienna, Va.

RACE SEX ADDRESS

Fairfax County did, in the County aforesaid, on or about the 22nd day

of June, 19 75, unlawfully, in violation of County Ordinance, Section 30-2.2.2.,

Conducting church services from a single family dwelling, without a special use permit.

Property zoned one-family residential (R-1) one acre.

These, Therefore, are to command you in the name of the Commonwealth to forthwith

before the Fairfax County General District Court at Fairfax, Virginia on

the 25th day of July, 19 75 at 9:30 o'clock A. M. the

to answer the said complaint and to be further dealt with according to law and there have this

with your return.

Given under my hand this 2 day of July, 19 75.

Special Magistrate

CTS-CTC-40

BEST COPY AVAILABLE

(COPY)

COMMONWEALTH OF VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA :

v. : Crim. No. 75-21764

FATHER JOSEPH E. GEDRA :

Defendant. :

A F F I D A V I T

I, HELEN S. LANE, Virginia Co-Counsel the Defendant, hereby depose and say that:

In the matter of the Statement of Facts prepared by me and Counsel John Joseph Matonis and attached to the Petition for Appeal filed with the Clerk of the Supreme Court of Virginia, signed only by myself and Mr. Matonis and lacking signatures of the Commonwealth of Virginia and of the trial Judge, Percy Thornton, all due diligence to obtain those signatures was made by Mr. Matonis prior to filing with the Clerk of the Supreme Court of Virginia, with some aid by me in setting up the appointment between him and Assistant Commonwealth Attorney, Lawrence Keenan.

Mr. Matonis later continued his efforts and met with Mr. Keenan's replacement, Mr. Michael Cassidy and Judge Thornton about the matter and they were told by His Honor to get together and clear up the statement to their satisfaction. The change from Keenan to Cassidy and the inability of the Commonwealth Attorney's office to provide us with Keenan's address or phone number, plus difficulty in contacting Cassidy, made agreement on the Statement of Facts difficult, if not impossible. Mr. Matonis told me that his messages went unanswer-

ed and due to Mr. Cassidy's noncooperation, he was forced to take it with the Petition for Appeal, lacking the two signatures.

My own experience has proved the same: my messages left at his office and also by phone with the secretary were unanswered. I had seen Mr. Keenan and carried out my agreement to send my only copy of the Statement of Facts, that one attached to the Petition, and asked that he get together with Mr. Cassidy and send one which they approved to me. I finally received it this Monday, November 1, 1976, after catching Mr. Cassidy answering his own phone, to extract his promise to send one. I found that one to have many statements of opinion rather than fact so he agreed to set up a conference for us with Judge Thornton. He had previously promised to set up a conference for us with Judge Thornton today, Friday, November 5, 1976, to get a mutually satisfactory Statement of Facts to add to that one timely filed with the Petition but lacking the signatures of the Commonwealth Attorney or his Assistant, Michael J. Cassidy. He had not set up the conference with Judge Thornton but he, Keenan and I did agree on a Statement of Facts, Monday, November 8, 1976. That lack of cooperation shown I can attest to and I am sure from that non-cooperation toward Virginia Co-Counsel, that Mr. Matonis' statement of non-cooperation toward him is equally true.

Dated November , 1976. _____

Helen S. Lane, Counsel for Defendant

(JURAT)

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

MEMORANDUM FOR THE COMMONWEALTH OF VIRGINIA IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

MEMORANDUM FOR THE COMMONWEALTH OF VIRGINIA IN OPPOSITION

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1. On July 2, 1975, the petitioner, Joseph Gedra, was charged with operating a church in a single family dwelling without a special use permit in violation of Section 30-2.2.1 of the Fairfax County Zoning Ordinance. He was tried initially before the Fairfax County General District Court

and was found guilty of the offense. Gedra appealed this conviction to the Circuit Court of Fairfax County where, on November 10, 1975, he was tried before a jury and was again found guilty of violating the Ordinance. His punishment was fixed at $50.00[1] and costs.

2. Gedra filed his Notice of Appeal and Assignment of Error from his Circuit Court conviction on December 10, 1975. Thereafter, he filed his Petition for a Writ of Error in the Supreme Court of Virginia. The Commonwealth filed her Brief in opposition to the Petition requesting, *inter alia,* that the Court dismiss the appeal because of Gedra's failure to comply with Rule 5:9 of the Rules of the Supreme Court of Virginia[2] which sets forth the requirements for making a written statement of facts, testimony or other incidents of the case a part of the record of appeal.[3] On November 16, 1976, the Supreme Court of Virginia rejected Gedra's Petition and refused a writ of error, "the court being of the opinion that the appeal was not perfected in the manner required by law." (Pet. App. A-1).[4]

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[1] Under Virginia law, a violation of a local zoning ordinance can only be punished by the imposition of a fine not to exceed $1,000.00. *See Va. Code Ann.* § 15.1-491(e) (Cum. Supp. 1976).

[2] The Commonwealth flatly denies that her counsel was recalcitrant in their dealings with opposing counsel or that her counsel was responsible for the failure of opposing counsel to perfect the appeal. In this regard, the affidavit of Michael J. Cassidy, Assistant Commonwealth's Attorney for Fairfax County, is set forth in the Appendix to this Memorandum at App. 1-App. 10. Furthermore, while a statement of facts was agreed to, it is not the statement of facts which appears in the Petition.

[3] Rule 5:9(c), as it was in force at the time of the appeal in question, is set forth in the Appendix to this Memorandum at App. 11.

[4] The reference to "Pet. App." refers to the Appendix to the Petition for Writ of Certiorari.

3. The Supreme Court of Virginia has held that Rule 5:9 is jurisdictional and that "failure to comply therewith will result, as in the present case, in dismissal, either before or after appeal is awarded. * * * [D]ismissal will continue to be the price of failure to comply with mandatory rule provisions." *Towler* v. *Commonwealth*, 216 Va. 533, 535, 221 S.E.2d 119, 121 (1976). In *Towler* the Supreme Court of Virginia took the opportunity "to reiterate the jurisdictional nature of Rule 5:9 and to reemphasize that necessity of compliance with its mandatory requirements . . . .[B]ecause [they] have observed far too many violations of this rule; and [they] lament the numerous instances in which [they] have been forced to dismiss appeals because of failure to observe the rule's requirements." *Id.* at 534, 221 S.E.2d at 121. It is clear, therefore, that the procedural requirements embodied in Rule 5:9 are not novel, nor were they fashioned for the first time in this case.

4. The decision of the Supreme Court of Virginia did not involve a federal question. Rather, it rests upon an adequate State ground, failure to perfect the appeal under the applicable Rules of the Supreme Court of Virginia. Under these circumstances, "the statutory prerequisite [set forth in 28 U.S.C. § 1257] for the exercise of this case of the reviewing power of this court is wanting." *Newman* v. *Gates,* 204 U.S. 89, 95 (1907). *See also Hammerstein* v. *Superior Court,* 341 U.S. 491, 492 (1951); *Chesapeake & Ohio R. Co.* v. *McDonald,* 214 U.S. 191 (1909).

5. Furthermore, the federal question raised by the petitioner is insubstantial. As a great many other localities have done, Fairfax County has enacted a comprehensive land use ordinance in which the land within its boundaries is zoned into several categories. The use which may be made of the

land depends upon the category into which the land has been zoned. In the instant case, the land in question is in a one family residential one acre (RE-1) district. In an RE-1 District there are several "uses of right" which are permitted, *e.g.*, single family dwellings. There are other uses permitted in an RE-1 District if a special use permit is obtained. Section 30-7.2.6.1.11 of the Fairfax Ordinance specifies that if a special use permit is obtained, the following uses are permitted in an RE-1 District: "Churches, chapels, temples, synagogues, convents, monasteries, seminaries, nunneries, and other places of worship, including Sunday schools and other uses appurtenant thereto; . . . ."[5] The petitioner did not obtain such a special use permit.

6. This Court has previously upheld the constitutionality of a local zoning ordinance which totally banned churches from a residential district. *See Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926). Indeed, in *Corporation of Presiding Bishop, C.J.C.L.D.S.* v. *Porterville,* 338 U.S. 805 (1949), this Court "dismissed for want of substantiality an appeal in which a church group contended that its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain residential areas." *American Communications Ass'n.* v. *Douds,* 339 U.S. 382, 398 (1950). *See also Corporation of Presiding Bishop, C.J.C.L.D.S.* v. *Porterville,* 203 P.2d 823 (Cal. 1949). Here, the ordinance does not constitute an absolute ban on churches in RE-1 Districts. Rather, it permits churches if a special use permit is obtained. Under these circumstances, the Fairfax Ordinance is plainly constitutional. *Cf. Village of Belle Terre* v. *Boraas,* 416 U.S. 1, 9 (1974).

[5] There are many other uses in addition to those specified in Section 30-7.2.6.1.11 for which a special use permit is required before they will be permitted in an RE-1 District. Because they are not germane to the Petition, however, they have not been set forth herein.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ANTHONY F. TROY
Attorney General of Virginia

D. PATRICK LACY, JR.
Chief Deputy Attorney General

MASTON T. JACKS
Assistant Attorney General

Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219

Counsel for Respondent

May 5, 1977

APPENDIX

COMMONWEALTH OF VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA

v.

FATHER JOSEPH E. GEDRA

Defendant.

AFFIDAVIT

I, Michael J. Cassidy, Assistant Commonwealth's Attorney for Fairfax County, Virginia, hereby depose and say that:

These are the facts regarding the lack of a Statement of Facts for the case of *Commonwealth of Virginia* v. *Joseph E. Gedra* to the best of my knowledge. Prior to my involvement in this matter, a motion was filed for the presentation of a Statement of Facts to Judge Thornton. That motion was sent by mail on January 8, 1976 and requested a hearing date of January 24, 1976. (Item 1). This mailing was within a day of the "sixty days from final judgment" limit for delivery of a written statement of facts required by Rule 5:9 of the Rules of the Supreme Court of Virginia. I was informed that Mr. John Matonis was unable to appear that day because of other commitments. The motion was taken off of that day's motions docket.

The matter was dropped until a substantially similar Statement of Facts and another motion for the signature of the trial judge were filed on March 19, 1976, over four months after the trial (Item 2). At the request of the petitioner, the motion was set for March 26, 1976. This counsel was present at 10:00 A.M. when court convened. The motion was called at approximately 10:30 A.M. Neither defense counsel was present in court at that time. An individual in priestly attire and fitting the description of Rev. Gedra was present in the court at that time but made no response

when the case was called. Since Mr. Lawrence Keenan, the trial prosecutor, had left this office for private practice and I had not been present at the trial, I submitted a prosecution version of the facts prepared by Mr. Keenan. The judge suggested that the matter should be sorted out in chambers with both counsel present, and then moved on to the next case. Sometime around 11:00 A.M. Mr. Matonis appeared in the Juvenile and Domestic Relations Court to which I had been assigned. He complained that he could not find the court room. I gave counsel a copy of the Commonwealth's Statement of Facts and suggested he set up a conference as requested by the judge. No such conference was ever arranged by Mr. Matonis, and I never saw him again. A review of my file shows only subsequent correspondence demanding my signature on other statements.

Contact was re-established in September of 1976, beginning with a letter to Mr. Keenan from Mrs. Helen Lane (Item 3 and 4). I cannot remember who was able to reach the other first by telephone, but as a result of a discussion of the case with Mrs. Lane, she requested and received copies of a substantial portion of my file. Many of the items sent were documents served on me by the Petitioner of which she, as local counsel, was unaware. A conference between Mrs. Lane, Mr. Keenan and myself was held sometime at the end of October or the beginning of November. Mr. Keenan delayed a trip out of town for a meeting. A statement was agreed upon (Item 5) and everyone left. The document was to be submitted for the judge's signature after it was typed. After Mr. Keenan had departed for Portsmouth, Virginia, Mrs. Lane returned to my office and wanted to rework the statement. Unable to get in touch with Mr. Keenan and not having been at the trial, I refused. I do not recall agreeing to arrange a meeting with

Judge Thornton. However, there was some discussion of appearing together before Judge Thornton for his signing of the agreed Statement of Facts. This was frustrated when a Circuit Court secretary informed me that Judge Thornton would be in Fairfax, when in fact he was going to Prince William County (the other half of his judicial circuit) on a particular day. Rather than delay Mrs. Lane, I suggested she take the signed statement to the judge rather than insisting that I be present. That statement was signed on the eve of the trial's anniversary.

It should be noted that the Statement of Facts signed by myself and the trial judge is not the one contained in the petition before this Court.

/s/ Michael J. Cassidy
Michael J. Cassidy
Assistant Commonwealth's Attorney

* * *

Item 1

* * *

NOTICE

To: Robert F. Horan, Jr., Esq.
Commonwealth's Attorney, Fairfax County
Lawrence R. Keenan, Esq.
Assistant Commonwealth's Attorney, Fairfax County
Fairfax County Courthouse
Fairfax, Virginia

Sirs:

Please Take Notice that the attached Statement of Facts on Appeal will be presented to the Honorable Percy

Thornton, Jr., Judge, for signature on January 24, 1976, a Motions Day in the Circuit Court of Fairfax County.
Dated: January 8, 1976

Yours, etc.,

Father Joseph E. Gedra

* * *

Item 2

* * *

NOTICE

Robert F. Horan, Jr., Esq.
Commonwealth's Attorney
Fairfax County
Fairfax County Courthouse
Fairfax, Virginia

Sir:

Please Take Notice that on the 26th day of March, 1976, Appellant-Defendant will present the attached statement of facts on appeal to the Honorable Percy Thornton, Jr., Judge, Circuit Court, Fairfax County, Fairfax County Courthouse, Fairfax, Virginia.

Dated: March 16, 1976

* * *

Item 3

Memo From The Desk Of

HELEN SCRYMGEOUR LANE

September 14, 1976

To: Lawrence Keenan, Esquire

Michael Cassidy, Ass't C.A., Fairfax County

Made copies of my only copy of the Statement of Facts for the *Gedra* Appeal which is part of the Petition for Appeal, which you, Mike, probably have.

Heard from John Matonis yesterday and he believed when he filed the Petition hurriedly that he had previously sent a copy to you, Larry. Perhaps you turned in that earlier copy when you turned over the rest of the C.A. files and papers.

At any rate, if you agree with it, the judge can sign it therewith. If there is not agreement, please call me and we'll set a time to amend it to satisfy both parties. When the copy is signed please send it directly to the Clerk for filing with that which is already there signed by John and myself.

Item 4

Lawrence R. Keenan
Attorney at Law

4085 Chain Bridge Road
Fairfax, Virginia 22030

(703) 273-6103

September 16, 1976

Helen S. Lane, Esquire
4924 Little Falls Road
Arlington, Virginia 22207

Re: Commonwealth v. Gedra

Dear Mrs. Lane:

I received today your statement of facts and have forwarded the same to Mike Cassidy of the Commonwealth Attorneys Office. Mr. Cassidy, to my knowledge, is in possession of a more accurate statement of facts in this case. I would respectfully suggest you contact Mike, get a copy of his statement of facts, and if it proves acceptable, adopt it as your statement of facts.

If Mr. Cassidy's statement of facts does not prove adequate to your needs, I will be more than glad to put myself at your and Mr. Cassidy's disposal so that we may try to resolve whatever questions or disagreements arise concerning the facts of the Gedra case.

In regard to the statement of facts you sent me, pages 3, 4, and 5 appear to state the facts in a light most favorable to Father Gedra's position. That is understandable. However, the statement which is found on page 6 in the second paragraph, beginning with the words, "This statement of facts . . . ," is totally unacceptable to me. An unsupported

statement such as this apparently is presented to the Supreme Court as an excuse for something that was not performed earlier. I am also curious as to whether the time limitations in regard to making a statement of facts part of the record, has already run.

I realize that Mr. Matonis has left you in a difficult position. I sincerely apologize for any inconvenience my departing the Commonwealth Attorney's Office may have caused you in this case.

Sincerely,

Lawrence R. Keenan

LRK/jaf
cc: Michael Cassidy, Esquire
Commonwealth Attorney's Office

Item 5

* * *

STATEMENT OF FACTS

On April 28, 1975, Mr. Lennart Konczy, a Zoning Inspector for Fairfax County, entered a house in a residential neighborhood which was owned by the Church of the Assumption, an unincorporated church, located at 10310 Vale Road, Vienna, Fairfax County, on the corner of Hunter Mill Road and Vale Road. Mr. Koneczy entered for the purpose of determining whether or not church services were being conducted there in violation of a County Ordinance. Once inside, he observed that such services were being held. What he observed was the celebration of the Latin Mass according to the Latin ritual of the Roman Catholic Church. Father Gedra and his parishioners, as well as other Roman Catholics, prefer to attend the Latin Tridentine Mass rather than

the New Order Mass officially prescribed by the Roman Catholic Churches that are accepted by the Bishop of the Arlington Diocese. Catholics who regularly attend Mass in Father Gedra's church travel from various parts of Virginia and Maryland and the District of Columbia.

Father Gedra's home is located on a one-acre lot zoned one-family residential (RE-1). Neither he nor the Church of the Assumption obtained a Special Use Permit to conduct Mass services at 10310 Vale Road. This is required by the County Ordinance in question. Father Gedra and his church had applied for a Special Use Permit and after hearings it was denied. Father Gedra could have appealed this decision, but he did not.

Counsel for Father Gedra and the church, John Joseph Matonis, advised Father Gedra, the church and its parishioners by a written opinion letter dated on or about January 25, 1975, that if the parking and traffic problems were handled by the parishioners parking somewhere else and being shuttled to Father Gedra's church, he would then have a constitutional right to celebrate Mass in his house before the congregation. Said counsel advised Father Gedra that, under the above conditions, the celebration of Mass in his home was protected by the constitutional guarantees of religious freedom, and that he need not apply and have approved his request for a Special Use Permit.

The church took possession of the house and grounds at 10310 Vale Road in 1972 and immediately started holding church services. From then until the present time, the number of persons attending Mass on Sunday and Holy Days averaged between 20 and 25 persons per service. On Sunday morning, Father Gedra had conducted two services, one at nine o'clock a.m., and one at eleven o'clock a.m. This he did on the day of Mr. Koneczy's inspection. Father Gedra usually celebrates Monday through Saturday Mass alone,

but on some occasions, parishioners have attended Mass in Father Gedra's house on weekdays.

The building resembles a residential house and has no steeples, crosses or any other architectural structures that would make the building look like a church. There is a sign on the front lawn that reads "Assumption Rectory."

Father Gedra celebrates Mass at an altar he built in his living room. Seats are placed in this room and in an adjoining dining room. Candles and other religious artifacts can be seen in the living room near the altar.

The driveway in front of the house is large enough for 13 or 14 cars, but is completely filled if that many cars are parked there. The driveway is accessible from both Hunter Mill Road and Vale Road. The lots in the area are as spacious as 10310 Vale Road. Adjoining 10310 on Hunter Mill Road and on Vale Road are similar lots with single family dwellings. Across Vale Road is an even larger lot with a single family dwelling. Across Hunter Mill Road is undeveloped land.

Since 1972, those who know about the parking at nearby Flint Hill Elementary School and the shuttle service to 10310 Vale Road park at the school parking lot about a mile away and are shuttled to and from Mass. However, some of the congregation attending Mass on any given Sunday do not know about the parking and shuttle policy and park in the driveway.

Defendant applied to the trial court to subpoena Mr. Horan, and the Court refused.

During his summation, the prosecutor said to the jury, in effect: "In essence, Father Gedra said to the community, 'screw your rights. Mine are superior.' "

The prosecutor argued to the jury that the conducting of a Mass in a private house used as a church without a Special Use Permit, was a violation of law that should be stopped.

Dated: November ...., 1976

John Joseph Matonis
Helen S. Lane
Counsel for Defendant

/s/ Helen S. Lane
Helen S. Lane

Robert F. Horan, Jr.
Commonwealth Attorney

By:
/s/ Michael J. Cassidy
Michael J. Cassidy
Ass't Commonwealth Attorney

/s/ Percy Thornton, Jr.

—Submitted and approved November 9, 1976

Percy Thornton, Jr.
Circuit Court Judge

* * *

RULE 5:9. TRANSCRIPT OR WRITTEN STATEMENT

* * *

(c) A written statement of facts, testimony or other incidents of the case becomes a part of the record when:

(i) a copy is mailed or delivered within sixty days after entry of final judgment to opposing counsel together with notice that the statement will be presented to the judge no earlier than ten days nor later than twenty days after such notice; and

(ii) the statement is signed by the judge and filed in the office of the clerk. The judge may sign the statement forthwith if it is signed by counsel for all parties.